STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2010
v	No. 291862 Wayne Circuit Court
JOHN HENRY CISTRUNK, Defendant-Appellant.	LC No. 08-018426-FC

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to murder, MCL 750.83; assault with intent to commit great bodily harm less than murder, MCL 750.84; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, second-offense, MCL 750.227b. The trial court, applying a third-offense habitual offender enhancement under MCL 769.11, sentenced him to 26 to 40 years' imprisonment for assault with intent to murder, five to 15 years' imprisonment for assault with intent to commit great bodily harm, 30 months' to five years' imprisonment for felon-in-possession, and five years' imprisonment for felony-firearm. We affirm.

Defendant's convictions arose from the shooting of Martin Paris and Nathaniel Floyd on the evening of October 22, 2008. Paris testified that defendant drove up to the home of Paris's sister, Antoinetta Gibson, that evening in an orange-and-black Dodge Charger looking for Gibson. Floyd, Paris's friend, then appeared at the home, and Paris and Floyd got in a vehicle to leave for some food. Defendant, who had driven away, returned in the Charger and kept asking for Gibson. He then shot toward Paris and Floyd. Paris was hit in the neck and arm. Floyd testified that he, too, was shot in the neck by defendant. Kevin Anderson testified that he was visiting the area in question that night, that he heard several gunshots, and that he saw a Charger in the area. Gibson testified that before the shooting incident she had had a friendship with defendant and had seen him seven or eight times. Todd Eby, a sergeant with the Detroit Police Department, testified that he prepared a photographic lineup for Paris and Floyd and that they both identified defendant as the shooter.

Defendant's brother, Henry Brown, testified that he was with defendant at defendant's home during the entire day of October 22, 2008. Gino Rucker and Sean Clark, two of defendant's friends, testified that defendant was at home taking part in a drug intervention for Brown at the time of the offenses. Samuel Williams, Jr., also testified that defendant was home

during the pertinent time. Abdul Kerek, the owner of an automobile-body shop, testified that defendant's Dodge Charger was towed to his shop in October 2008. He stated that he could not remember the exact date the car was brought it but he was "[a h]undred percent sure" that it was taken by the police three days after it was brought in. Earlier, Eby had testified that the police department retrieved the car from Kerek's shop on October 24, 2008. Timothy Jackson, a tow-truck driver, testified that he towed defendant's car to Kerek's shop on October 21, 2008. Jamie Douglas, defendant's girlfriend, testified that defendant's Charger was "in the shop" at the time of the offenses. She also testified that defendant was home on the evening in question.

Defendant first argues that the trial court committed error requiring reversal when it questioned Kerek and Jackson.[1] MRE 614(b) states that a trial court "may interrogate witnesses, whether called by itself or by a party."

> The trial court may question witnesses in order to clarify testimony or elicit additional relevant information. . . . However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. [*People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992).]

As stated in *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986): "The court's discretion in questioning witnesses is not unlimited. The court must avoid any invasion of the prosecutor's role and exercise caution so that its questions will not be intimidating, argumentative, prejudicial, unfair or partial."

> The test is whether a judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, . . . and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case. [*Id*.; internal citations and quotation marks omitted; emphasis removed.]

We have reviewed the trial court's questioning and find no evidence of partiality and no basis for reversal. It is apparent that the trial court was simply trying to elicit more information to aid the jurors in ascertaining the truth. For example, the court's request to Kerek for the telephone number of the tow-truck driver evidences the court's attempt to have all pertinent witnesses testify regarding the location of the Dodge Charger on the date in question. The questioning in this case simply does not compare to the trial court's leading, derogatory, and inappropriate questioning in *Sterling*, *id*. at 229-231. Moreover, the trial court gave the following instruction to the jurors:

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[1] Defendant argues that his failure to object should not preclude review of this issue using principles for preserved error because it was the court itself that committed the error. See *People v Smith*, 64 Mich App 263, 269-270; 235 NW2d 754 (1975). The prosecutor argues that review should be under the plain-error doctrine because of defendant's failure to object to the court's questioning. We need not resolve this dispute because we find that reversal is unwarranted even assuming that the issue has been properly preserved.

> My comments, rulings, questions and instructions are . . . not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case.
>
> However when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about this case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion.
>
> You are the only judges of the facts and you should decide this case from the evidence.

This instruction clarified the court's role for the jury. "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We find that no error occurred with regard to the trial court's questioning and that reversal is unwarranted.

Defendant next argues that the prosecutor committed misconduct requiring reversal by eliciting testimony that defendant had "stripped a furnace" from an abandoned house and by implying that defendant wore gang-related clothing. Because defendant did not object to the alleged misconduct at trial, his claims of misconduct are subject to review under the plain-error doctrine. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Thus, to obtain appellate relief, defendant must demonstrate a plain, i.e., clear or obvious, error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *Schutte*, 240 Mich App at 720. In general, "[t]he test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Defendant takes issue with the following colloquy between the prosecutor and Nathaniel Floyd:

> *Q*. Okay. Did you ask this gentleman not to shoot you?
>
> *A*. Yeah.
>
> *Q*. Okay. Did you know this gentleman?
>
> *A*. No. But I seen him earlier that day.
>
> *Q*. You seen him earlier on that day?
>
> *A*. Yep.
>
> *Q*. Did you have any encounter with him?
>
> *A*. No. He was next door snatching a furnace up.
>
> *Q*. Okay. And when you say "next door" was he at the -- at the -- Ms. Scott's next door to --

A. No, the abandoned house.

Q. Okay. The abandoned house.

* * *

Q. Okay. Were you aware that Martin had had any conversation with Mr. Cistrunk?

A. None.

Q. As far as you knew, there was no problem, other than he's stripping the house next door to you?

A. Yeah, and I'm concerned.

Q. Okay. You were concerned about that, but you didn't say anything; did you?

A. Uh-uh, I let him do his thing.

We find no clear or obvious error with regard to the evidence of defendant's having "stripped a furnace" because the evidence was admissible under MRE 404(b)(1). MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Three factors must be present for prior-acts evidence to be admissible under MRE 404(b)(1): (1) the evidence must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Floyd testified that he did not know defendant but had seen him earlier in the day in the context of the furnace incident. Therefore, the testimony pertained to Floyd's familiarity with defendant and his corresponding ability to identify him.[2] MRE 404(b)(1) lists "identity" as one of the bases on which to admit other-acts evidence. Floyd's ability to accurately identify defendant was highly relevant in this case, which hinged on identification. Moreover, any

[2] The prosecutor later asked Floyd: "And when you were giving a description of what his hair looks like, you were giving that based on seeing him earlier in the day; is that right?" Floyd answered "Yes."

prejudicial effect of the other-acts testimony was lessened by the dissimilar nature of the prior act as compared to the instant offenses. Under the circumstances, defendant has not met his burden for appellate relief under the plain-error doctrine.

Defendant also argues that his attorney rendered ineffective assistance by failing to object to the introduction of the other-acts testimony. Determining whether a defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms," and it must be shown that "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). Additionally, the defendant must show that the resultant proceedings were "fundamentally unfair or unreliable." *Rodgers*, 248 Mich App at 714.

Given the admissibility of the evidence under MRE 404(b)(1),[3] we cannot find that defense counsel's failure to object fell below prevailing professional norms, affected the outcome of the case, or rendered the proceedings unfair or unreliable.

Defendant also objects to the following colloquy between the prosecutor and Floyd:

Q. Let me ask you this, sir: Was the hoodie on his head in such a way that he was trying to hide his -- so people couldn't ID him?

A. Nope.

Q. It just was on his head? You understand how --

A. Yes. Yes.

Q. -- the young gangsters do it when they put -- in the movies, when they put it on their -- on their head?

A. Yes.

Q. It was done like that?

A. Yeah.

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[3] We acknowledge that the prosecutor did not file a notice of intent to introduce other-acts evidence. See MRE 404(b)(2). However, especially given the way the evidence was initially introduced – i.e., by way of an arguably nonresponsive answer by Floyd – the trial court still would have been within its rights to overrule any objection to the evidence raised by defense counsel.

Defendant contends that this exchange constituted an unfair disparagement of defendant by the prosecutor. We find no plain error with respect to the exchange. The prosecutor did not refer to defendant himself as a "gangster" but merely attempted to elicit how defendant was wearing his hood at the time of the shooting. Given the centrality of the issue of identification in this case, it was important for the prosecutor to clarify that the hood did not interfere with Floyd's identification of defendant. We further find, contrary to defendant's argument, that the failure by defense counsel to object to the prosecutor's questioning did not amount to ineffective assistance of counsel. The failure to object did not fall below prevailing professional norms, did not affect the outcome of the case, and did not render the proceedings unfair or unreliable.

Defendant next argues that it was a violation of double-jeopardy principles for him to be sentenced for both felon-in-possession and felony-firearm. This argument, however, has been rejected by the Michigan Supreme Court. See *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

In a supplemental brief that is difficult to decipher, defendant mentions that he has not received for review certain information from the lower-court case, and he mentions certain actions that he wishes his appellate attorney would perform. As stated in *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it. [Internal citations and quotation marks omitted.]

Defendant's supplemental briefing is so inadequate that we deem abandoned any issues he is attempting to raise by way of it.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens